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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT LEE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0609-CR-798

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No.49F09-0604-FD-064352

April 25 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Robert Lee appeals his two-and-a-half year sentence for operating a vehicle while intoxicated as a Class D felony, contending that his sentence is inappropriate. The State cross-appeals, arguing that the trial court erred in failing to order Lee's sentence for operating while intoxicated to run consecutively with Lee's sentence for violating probation. Finding that Lee's sentence is not inappropriate and that the trial court did, in effect, order consecutive sentences, we affirm the judgment of the trial court.

Facts and Procedural History

On April 9, 2006, Lee was arrested after he was spotted driving the wrong way down a one-way street. He had been drinking a mixture of tea, honey, and whiskey, and a portable breath test showed that Lee had a blood alcohol content of 0.17. Lee had three previous convictions—in 2001, 2002, and 2003—for operating while intoxicated. Also, at the time of the current offense, Lee was on probation as a result of his 2003 OWI conviction.

The State charged Lee with: Count I, operating a vehicle while intoxicated ("OWI") in a manner that endangers a person as a Class D felony;¹ Count II, operating a vehicle with an alcohol concentration equivalent to at least fifteen-hundredths gram of alcohol per one hundred milliliters of blood or per two hundred ten liters of breath as a Class D felony;² and Count III, public intoxication, a Class B misdemeanor.³ Pursuant to

¹ Ind. Code §§ 9-30-5-2(b), -3(1). This crime is generally a Class A misdemeanor, but the charge was elevated to a Class D felony because of Lee's 2002 OWI conviction.

² Ind. Code §§ 9-30-5-1(b), -3(1). This crime is generally a Class A misdemeanor, but the charge was elevated to a Class D felony because of Lee's 2002 OWI conviction.

a plea agreement, Lee pled guilty to Count I and the State dismissed Counts II and III. The State also agreed not to file a habitual substance offender count. The parties agreed to leave sentencing to the discretion of the trial court.

At the sentencing hearing, Lee's attorney stated that Lee admitted that the current offense constituted a violation of his probation on his 2003 OWI conviction. The trial court identified Lee's guilty plea as a mitigating circumstance and his criminal history as an aggravating circumstance. The trial court also identified Lee's history of problems with alcohol as "a partial mitigator, partial aggravator[.]" Tr. p. 24. The trial court imposed a sentence of 272 days for the probation violation and a sentence of 910 days (approximately two and a half years) for the current OWI. Lee now appeals.

Discussion and Decision

On appeal, Lee contends that his sentence is inappropriate. The State cross-appeals, contending that the trial court erroneously failed to order consecutive sentences for Lee's probation violation and the current offense.

We note that Lee committed the instant offense after our legislature replaced the former "presumptive" sentencing scheme with the present "advisory" sentencing scheme. Under this new scheme, we review sentences under a single standard, established by Indiana Appellate Rule 7(B): whether the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Gibson v. State*, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006); *McMahon v. State*, 856 N.E.2d 743, 752 (Ind. Ct. App. 2006). In performing this review, we will assess the trial court's recognition or nonrecognition of

³ Ind. Code § 7.1-5-1-3.

aggravators and mitigators as an initial guide to determining whether the sentence imposed is inappropriate. *Gibson*, 856 N.E.2d at 147; *McMahon*, 856 N.E.2d at 748.

Lee first argues that his sentence is inappropriate in light of the nature of his offense. He stresses that his act of operating a vehicle while intoxicated did not cause an accident or injury. This is certainly fortunate, but it is also true that Lee was pulled over while driving the wrong way down a one-way street. Lee's conduct posed a great danger to himself and to other drivers. We cannot say that Lee's sentence is inappropriate in light of the nature of his offense.

Lee also argues that his sentence is inappropriate in light of his character. He notes that he accepted responsibility for his actions by pleading guilty and that he informed the trial court of his desire to quit drinking. The trial court recognized both of these factors when it identified Lee's guilty plea as a mitigating circumstance and Lee's history of alcohol problems as "a partial mitigator[.]" Tr. p. 24. However, the trial court determined that the aggravating circumstances outweigh those mitigating circumstances. Specifically, the trial court noted Lee's extensive criminal history, including the following convictions: larceny in 1959; assault and battery in 1960; felony auto theft in 1962; felony entering to commit a felony in 1962; felony second degree burglary in 1966; felony second degree burglary in 1971; operating while intoxicated in 2001; Class D felony operating while intoxicated in 2002; Class D felony operating while intoxicated in 2003. The instant offense represents Lee's seventh felony conviction, as well as his fourth conviction for operating while intoxicated within the last six years. In addition, Lee was on probation for his 2003 operating while intoxicated conviction when he

committed the current offense. Given this criminal history, in particular the recent drunk driving convictions, Lee's sentence is not inappropriate in light of his character.

In its cross-appeal, the State argues that the trial court erred in failing to order Lee's sentences for his probation violation and the instant offense to run consecutively. *See* Ind. Code § 35-50-1-2(d) (requiring consecutive sentences when, after being arrested for one crime, a person commits another crime before the date the person is discharged from probation for the first crime). It is true that the trial court did not formally order the sentences to run consecutively. However, we agree with Lee that the trial court did, in effect, order consecutive sentences. The trial court sentenced Lee to 272 days for the probation violation and noted that Lee had already been in jail from the date of his arrest—April 9, 2006—to the date of sentencing—August 22, 2006—a total of 136 days.⁴ As Lee notes, 136 days of jail time plus an equal 136 days of good time meant he completed the sentence for violating probation (272 days) as of the date of sentencing. Furthermore, the trial court did not grant Lee any credit against his 910-day sentence for operating while intoxicated for time served. In assigning the credit for time served to Lee's sentence for violating probation, the trial court essentially ordered consecutive sentences. Remand for a more formal order is unnecessary.

Affirmed.

BAILEY, J., and BARNES, J., concur.

⁴ The trial court mistakenly stated that Lee had been in jail for 146 days. *See* Tr. p. 25.